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Summary

UTC continues to believe that the optimum method of expediting the introduction of emerging telecommunications services, while at the same time fulfilling the FCC's commitment to protect the operational and financial integrity of the incumbent 2 GHz microwave users, is to rely on marketplace mechanisms. The FCC's goal should be to let the marketplace resolve relocation issues, but to have a mandatory relocation program in place as a "safety net" to handle any situations where the incumbent microwave users refuse to deal in good faith.

Accordingly, the FCC should not attempt to define "comparable alternative facilities" by reference to any single, inflexible standard. Rather, the Commission should create a process that permits and encourages parties to negotiate privately and to identify the factors that each microwave licensee considers important to an assessment of "comparability."

In order for such an approach to be effective, a sufficiently lengthy period of voluntary negotiations between new telecommunications service providers and existing 2 GHz microwave licensees is necessary to allow market forces to work. Contrary to the assertions of some new service proponents, the adoption of a lengthy negotiation period will serve the public interest by:

- (1) encouraging the parties to resolve differences voluntarily;
- (2) stimulating the development of spectrum-sharing techniques;

(3) minimizing the need for the FCC to intervene in what could be up to 29,000 relocation decisions; and (4) allowing the marketplace to establish fair compensation and reasonable relocation arrangements, which could serve as a body of experience to be applied in contested cases.

The most effective and rationale method to promote the use of voluntary negotiations between incumbents and new service providers is through the adoption of a "sliding period" of negotiations, of at least five (5) years, commencing with the date each new service license is granted in any particular area. Adoption of a 5-year sliding negotiation period would ensure equal treatment of all segments of the 2 GHz band (including unlicensed bands), and that the obligation to negotiate in good faith would apply equally to all new users of the 2 GHz band.

UTC is adamantly opposed to the adoption of a shorter transition period for those locations where there is little or no available spectrum. If a new service licensee is permitted to foreshorten the negotiation period by claiming "lack of spectrum," there will be no incentive for new service licensees to use spectrum-sharing techniques or to negotiate.

Finally, in the few situations where voluntary negotiations fail to achieve a satisfactory result and mandatory relocation procedures must be invoked, UTC recommends the use of mediation as a first step in resolving points of disagreement.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Redevelopment of Spectrum)	
to Encourage Innovation in)	ET Docket No. 92-9
the Use of New)	
Telecommunications)	RM-7981
Technologies)	RM-8004

TO: The Commission

REPLY COMMENTS OF THE
UTILITIES TELECOMMUNICATIONS COUNCIL
ON
THIRD NOTICE OF PROPOSED RULE MAKING

Pursuant to Section 1.415 of the Commission's Rules, the Utilities Telecommunications Council (UTC) hereby submits its Reply Comments on the Third Notice of Proposed Rule Making, FCC 92-437, released October 16, 1992 (Third NPRM), in the above-captioned proceeding. By the Third NPRM, the Commission has requested comment on some of the details necessary to implement the 2 GHz transition rules which were adopted in the simultaneously-released First Report and Order in this proceeding.

I. INTRODUCTION

UTC, as the national representative on communications matters for the nation's electric, gas, water and steam utilities, submitted extensive comments in this proceeding. Many of UTC's member utilities are licensed to operate in

the 1850-2200 MHz band for point-to-point microwave communications, and will be significantly affected by any mandatory relocation rules adopted in this proceeding. Accordingly, UTC's comments stressed the need for a transition plan based on market forces, voluntary negotiations, and mediation. Below, UTC again addresses these issues, in the context of the comments filed by the various parties in this proceeding.

II. THE TRANSITION FRAMEWORK RULES HAVE ALREADY BEEN ADOPTED

As noted in UTC's comments, the Commission adopted in the First Report and Order (First R&O) a transition framework for the orderly migration of incumbent microwave systems from the 2 GHz band in order to facilitate the introduction of emerging telecommunications technologies. The rules, as adopted by the FCC, provide that: (1) incumbent licensees and new service licensees may negotiate voluntarily over the terms for relocating incumbent users to other bands or alternative media; and (2) after a specified period of time, a new service licensee may request mandatory relocation of a non-exempt incumbent microwave system, subject to certain conditions necessary to ensure that the incumbent licensee is made "whole," both

operationally and financially.^{1/} Among the conditions required for mandatory relocation are the following:

- (1) The new service licensee guarantees payment of all relocation costs;
- (2) The new service licensee is responsible for implementing the replacement facilities;
- (3) The new service licensee is responsible for building and testing the replacement facilities;
- (4) The incumbent licensee is not required to relocate until the "comparable alternative facilities" are available for a reasonable time to make adjustments and ensure a "seamless handoff;" and
- (5) If, within one year, the incumbent licensee demonstrates that the new facilities are not comparable to the old facilities, the new service licensee is responsible for remedying the defects or relocating the incumbent to its former facilities.^{2/}

Some of the commenters appear to be confused over the finality of the rules contained in the First R&O. For example, Personal Communications Network of New York (LOCATE) characterizes the above described transition

^{1/} In the First R&O, the Commission provided an exemption from the mandatory relocation procedures for microwave systems licensed to public safety and special emergency radio services -- including state and local governments, police, fire, and medical emergency communications.

^{2/} First R&O, Appendix A ("Final Rules"), to be codified at 47 C.F.R. §94.59(b).

framework rules as FCC "proposals."^{3/} Contrary to the assertions of LOCATE, the Commission has made clear that the First R&O specifically adopted the transition framework rules.^{4/}

Therefore, LOCATE's suggestion that the Commission adopt a rule wherein existing 2 GHz microwave users revert to a secondary licensing status after a fixed time period^{5/} is inconsistent with the rules that the FCC has already adopted. Under the final rules adopted in the First R&O, all existing 2 GHz microwave licensees retain co-primary licensing status until such time as they relocate from the 2 GHz band, under either a voluntary or involuntary mechanism.^{6/} Moreover, UTC disagrees with LOCATE's argument that the Commission's definition of co-

^{3/} LOCATE, pp. 8-10.

^{4/} See, Erratum in ET Docket No. 92-9, released October 29, 1992. These Rules became effective on January 27, 1993. Further, while UTC, the American Public Power Association (APPA), and Apple Computer, Inc. (Apple) have all filed petitions requesting reconsideration and/or clarification of certain aspects of these final rules, no other parties have submitted timely requests for reconsideration or clarification of the First R&O.

^{5/} LOCATE, p. 8.

^{6/} First R&O, para. 24. The FCC also noted that the co-primary licensing status also extends to modifications and reasonable extensions of existing 2 GHz microwave systems as clarified in the "2 GHz Licensing Policy Statement," Public Notice, Mimeo No. 23115, released May 14, 1992.

primary licensing status is not true co-primary sharing because new users must protect existing users under a first in time rule.^{2/} LOCATE's argument is unfounded, co-primary licensing status has always been premised on a first in time, first in right rule.^{3/}

The United States Small Business Administration's recommendation that the current 2 GHz licensees should pay the cost of relocation through the rate regulation process is also at odds with the final rules adopted in the First R&O.^{2/} Further, the rules that the FCC has adopted are reasonable in that they impose the costs of relocation on the parties that will financially benefit from the emerging technologies. Finally, the U.S. Small Business Administration's suggestion that the FCC adopt a mechanism whereby only large commercial entities seeking emerging technology licenses pay relocation costs should be rejected. Such a rule would create a competitive imbalance

^{2/} LOCATE, pp. 4-5.

^{3/} See, e.g., Midnight Sun Broadcasting Co., 11 FCC 1119 (1947); and Sudbrink Broadcasting of Georgia, 65 FCC 2d 691 (1977).

^{2/} U.S. Small Business Administration, p. 7.

between different PCS providers and would unnecessarily complicate the transition process.^{10/}

III. RULES PROPOSED IN THE THIRD NOTICE OF PROPOSED RULEMAKING

In order to implement the transition rules described above, the Commission has requested comment on several of the details of the mandatory relocation procedures:

- (1) How should the FCC define "comparable alternative facilities" in assessing the reasonableness of a new service licensee's relocation proposal?
- (2) How should disputes between incumbents and new service licensees be handled?
- (3) What period of time should be provided before parties could resort to the mandatory relocation procedures?
- (4) How could tax certificates be used in this transition framework?

A. Commenters Support The Use Of Private Negotiations To Define Comparability

1. Comparable Alternative Facilities Must Meet Unique Operational Needs Of Individual Users

A large number of the commenters, representing both existing microwave users and potential emerging technology service providers, support UTC's position that the FCC should not attempt to define "comparable alternative facilities" by reference to any single, inflexible

^{10/} UTC also notes that contrary to the assumptions of the U.S. Small Business Administration, few of the major proponents of emerging technologies are small businesses lacking in capital.

standard. Rather, these commenters echo UTC that the Commission should create a process that permits and encourages parties to negotiate privately and to identify the factors that each microwave licensee considers important to an assessment of "comparability." For example, Omnipoint Communications (Omnipoint) maintains that the FCC's rules should allow for maximum regulatory and negotiating flexibility.^{11/} Similarly, APPA argues that if parties are encouraged to privately negotiate relocation agreements, there is no need to define what constitutes comparable alternative facilities.^{12/}

Moreover, as UTC noted in its comments, there are so many variables involved in the design and operation of 2 GHz microwave systems that it would be unwise for the Commission to try to list, in advance, all the criteria by which replacement facilities should be evaluated for "comparability." Private microwave systems have been developed to meet the users' unique operational requirements. As GTE Service Corporation (GTE) notes, for facilities to be comparable, they must be comparable in the eyes of the 2 GHz incumbent. Thus, if an incumbent microwave user engineered a higher than industry standard

^{11/} Omnipoint, p. 8.

^{12/} APPA, p. 5.

performance level on its links, then a facility proposed at the industry standard level would not be comparable for that particular user.^{13/}

UTC would support Telocator's suggestion that a 2 GHz microwave user's existing engineering design and equipment specifications could serve as a benchmark for comparability.^{14/} However, UTC cannot support Telocator's suggestion that an emerging technology service provider's reliance on such specifications creates a "rebuttable presumption" that it has fulfilled its obligation. There are far too many variables involved in a relocation to higher microwave facilities that might render design specifications for 2 GHz systems inadequate in higher bands.^{15/} Further, as the entity proposing to relocate an existing facility, the emerging technology licensee should bear the burden of proof regarding comparability.

^{13/} GTE, p. 7.

^{14/} Telocator, pp. 11-12.

^{15/} For example, in adopting an involuntary migration plan for point-to-point ITFS stations to accommodate MMDS, the FCC noted that it did not believe "that a uniform standard can be established to determine suitability in all cases, due to widely differing conditions." Second Report and Order in GEN. Docket No. 90-54, FCC 91-302, released October 25, 1991, at para. 32.

UTC opposes Ameritech's suggestion that the Commission establish an upper limit on reliability.^{16/} As noted above, existing 2 GHz users such as utilities rely on their microwave facilities for critical communications and must be guaranteed the same level of reliability in their replacement facilities that they currently enjoy. The American Petroleum Institute (API) reiterates this point, arguing that an incumbent must never be forced to compromise its current level of reliability merely because the new technology service provider disagrees on whether or not the incumbent licensee needs that level of reliability.^{17/}

Equally objectionable is Ameritech's suggestion that the new facilities should not have greater bandwidth capacity than that which incumbent 2 GHz microwave users presently utilize.^{18/} Such a suggestion ignores the fact that utilities have engineered their 2 GHz microwave systems based on the knowledge that they have relatively dynamic communications requirements and therefore must have the flexibility to meet changing bandwidth requirements. Further, in no event should the Commission limit the

^{16/} Ameritech, p. 5.

^{17/} API, p. 19.

^{18/} Ameritech, p. 5.

ability of incumbents with bandwidth requirements of less than the minimum channel bandwidth of the replacement spectrum to obtain licensing (i.e., allow existing 800 kHz 2 GHz system to relocate to a 1.25 MHz channel in the 6 GHz band).

2. Existing Microwave Users Must Have Oversight Authority Regarding Construction/Engineering Of Replacement Facilities

On November 30, 1992, UTC filed a "Petition for Clarification and/or Reconsideration" requesting that the Commission clarify, that while the emerging technology licensee must bear the costs, the incumbent 2 GHz microwave user has the right to oversee the engineering, construction and testing of its microwave replacement facilities. UTC noted that such oversight authority should include the right of the incumbent to engineer, build and test the replacement facilities itself or to select the contractors. UTC suggested that the emerging technology entity should have the right to require the incumbent to justify costs incurred, and would be entitled to periodic status reports.

In its petition, UTC noted that such a clarification is necessary since PCS licensees and other emerging technology licensees are not necessarily familiar or well-suited to construct microwave systems. Moreover, UTC pointed out that often utilities are not using 2 GHz

microwave systems for standard voice or data applications but instead are using these systems for instantaneous control of utility systems such as high voltage transmission facilities. Thus, utilities require precision engineering, construction and testing of their facilities. Finally, UTC noted that utilities have specifically mandated procedures for the selection of contractors working on or near their facilities due to safety and liability considerations.

A number of commenters supported UTC's proposal. For example, the transition plan suggested by Telocator specifically contains a provision whereby existing 2 GHz microwave users and new technology licensees may determine the allocation of responsibilities regarding the preparation of relocation facilities.^{19/} Similarly, API argues that its members must have control over the implementation of the replacement facilities in order to meet internal quality assurance requirements. API also notes, that allowing incumbents to oversee the construction/engineering of their replacement facilities will go a long way in ensuring that the facilities will be found acceptable when finally installed and activated.^{20/}

^{19/} Telocator, p. 11.

^{20/} API, pp. 16-18.

Commenters such as API, APPA and the Association of American Railroads (AAR), also agree with UTC that the Commission must clarify that existing 2 GHz microwave users will not be required to relocate to non-microwave replacement facilities unless the incumbent specifically agrees to the use of such facilities, and similarly that the replacement system for private licensees should be a private communications system, owned and controlled by the incumbent microwave licensee.^{21/}

**3. Relocation Costs Must Include All Costs
Necessary To Ensure Comparability**

In its comments, LOCATE argues that the Commission should specifically limit incumbents to "reasonable" relocation costs.^{22/} UTC agrees with this suggestion. However, it must be recognized that reasonable relocation costs must include all costs necessary for the provision of comparable alternate facilities. Thus, in addition to the relocation costs of engineering, equipment, site and FCC fees identified by the FCC in the First R&O, there are a number of other reasonable costs that must be accounted for by the emerging technology service provider.

^{21/} API, p. 19; APPA, pp. 5-6; and AAR, pp. 20-21.

^{22/} LOCATE, p. 11.

For example, as Metropolitan Water District of Southern California (Metropolitan) notes, the FCC must also ensure that the costs of all activities necessary for implementing new facilities, such as frequency coordination and cost analysis of the complete relocation procedure, are assumed by the emerging technology service provider.^{23/} Moreover, as API notes the Commission should clarify that equipment costs include the capital costs of spare parts that an incumbent normally keeps in inventory in connection with operation of its 2 GHz system.^{24/}

UTC is also in full agreement with API that another replacement cost that must be included is any expense incurred by an incumbent that is necessary to ensure the integrity of its entire telecommunications system, particularly when only a "partial migration" of a multi-link system is mandated. As API observes, additional costs may be involved in successfully integrating a "hybrid" system (e.g., adding one new digital path at a higher frequency to an existing 2 GHz analog network).^{25/} Placing the responsibility of these costs on the new service provider is entirely consistent with the FCC's transition

^{23/} Metropolitan, p. 12.

^{24/} API, p. 15.

^{25/} API, p. 16.

rule that the emerging technology service provider guarantees any reasonable additional costs that the fixed microwave user might incur as a result of operation in another fixed microwave band or migration to another medium.^{26/}

Similarly, the emerging technology provider must bear the full financial burden of any costs associated with the movement of incumbents to alternate non-microwave facilities. UTC therefore opposes the suggestion of ROLM that would limit relocation expenses associated with alternative media, such as fiber optics, to the cost of interface equipment.^{27/} ROLM's recommendation would not begin to cover the true cost of a conversion to fiber optics since it ignores the significant cost involved in obtaining easements and constructing a fiber optic system.^{28/}

^{26/} First R&O, Appendix A, § 94.59(b)(1).

^{27/} ROLM, p. 5.

^{28/} See UTC's Comments in ET Docket No. 92-9, filed on June 8, 1992, for a description of estimated costs for building fiber optic replacement facilities.

Throughout this proceeding, the Commission has stated its intention to rely on marketplace forces to provide for the introduction of new telecommunications services.^{29/} Consistent with this approach, UTC submits that reliance on market forces to determine comparability will foster a cooperative environment and will minimize the need for any Commission involvement. More importantly, UTC's proposal will promote the development of emerging telecommunications technologies by affording new service licensees flexibility to relocate microwave systems to facilities that meet each user's needs, not the Commission's pre-defined notions of "comparability." Finally, the market-based plan suggested by UTC will bring this phase of Docket 92-9 to a close at the earliest possible date, and without the need for protracted negotiated rulemaking.

**B. Parties Support The Use Of Mediation
To Resolve Disputes**

1. Market Forces Will Encourage Negotiations

UTC stated, and continues to believe, that the selection of a dispute-resolution mechanism for mandatory relocation should be guided by four principles: (1) the parties should be encouraged to resolve their own

^{29/} Notice of Proposed Rulemaking (NPRM) in ET Docket No. 92-9, 7 FCC Rcd 1542, 1545 (1992); Notice of Proposed Rulemaking (NPRM) in GEN. Docket No. 90-314, 7 FCC Rcd 5676, 5694 (1992).

differences; (2) the need for Commission involvement should be minimized; (3) matters that could affect licensing policy or set administrative "precedents" should not be delegated to outside decision-makers; and (4) disputes should be handled promptly. Upon review of the various comments, UTC reiterates its belief that the controlled use of mediation would best meet these objectives.

As UTC noted in its comments, the transition rules adopted in the First R&O are premised on voluntary negotiations, with mandatory relocation available as a "fail safe" measure in case of unreasonable holdouts by incumbent licensees. The Edison Electric Institute (EEI) and other commenters echo UTC that this transition framework will lead to successful relocations in the vast majority of cases with no need for dispute-resolution procedures.^{30/}

Those few commenters that oppose the use of private negotiations appear to base their objections on a fear that existing 2 GHz microwave users will attempt to "ransom" their spectrum. For example, LOCATE maintains that the existence of a voluntary negotiation period will allow

^{30/} EEI, p. 3.

incumbents to demand windfall profits from emerging technology service providers.^{31/}

The concerns expressed by LOCATE and others are groundless and are based on a fundamental misunderstanding of the use to which private microwave users put their facilities. As UTC and numerous other commenters emphasize, private microwave facilities are a business "tool," and not a commercial "franchise." UTC understands that the proponents of commercial PCS systems value spectrum for its profit-making potential, and are inclined to attribute the same motives to private microwave licensees. However, the evidence submitted in this proceeding confirms that microwave licensees will, in good faith, negotiate for reasonable offers to relocate to alternate facilities. For example, in the Third NPRM the Commission noted that two private microwave licensees, Baltimore Gas and Electric and the City of San Diego, would be amenable to relocating in return for fair compensation.^{32/} Moreover, in its own comments LOCATE heralds its ability to obtain reasonable market-based agreements with incumbents regarding relocation.^{33/}

^{31/} LOCATE, p. 6.

^{32/} Third NPRM, para. 10 and n. 14.

^{33/} LOCATE, p. 3.

Further, as UTC argued in its comments, to the extent voluntary negotiations could lead to stone-walling or unreasonable demands for compensation, the mere availability of a mandatory relocation procedure will act as an incentive for incumbent licensees to negotiate in good faith. By granting a "self-help" remedy to new service licensees, the Commission has ensured that incumbent licensees' bargaining power will be restrained. Even without the threat of mandatory relocation procedures, marketplace realities will limit any incumbent's ability to hold-out very long. History has shown that when a band is reallocated to a new service, any "grandfathered" licensees remaining in the band soon find themselves "orphaned" by equipment manufacturers, who no longer find it profitable to maintain production lines or spare parts for such a limited market.

Finally, as UTC noted, most licensees in the 2 GHz band would welcome the opportunity to discuss relocation so that continued operations will not be threatened by interference from the new technology systems, or "orphaned" due to the demise of the 2 GHz equipment market.

2. **Mediation Is The Most Appropriate Dispute Resolution Technique**

In the few situations where mandatory relocation procedures must be invoked, UTC recommended that mediation be used as a first step in resolving points of disagreement. The flexible approach of mediation provides an opportunity for the parties to craft mutually-agreeable solutions tailored to their unique circumstances. UTC also noted that mediation would be more appropriate than arbitration since arbitration is more adversarial in nature, and is more likely to require the FCC to get involved in settling disputes.

There was wide support among the commenters for the use of mediation.^{34/} Moreover, while a few of the commenters suggest the use of arbitration, this seems to be an indication of support for alternative dispute resolution techniques generally, and does not appear to indicate a preference for arbitration over mediation.^{35/} For example, Southern suggests that the FCC incorporate the procedures set forth in the Administrative Dispute Resolution Act

^{34/} Telocator, pp. 12-13; TWT, pp. 20-21; APPA, p. 7; API, p. 21; EEI, p. 5; Metropolitan, pp. 16-18; and the National Rural Electric Cooperative Association (NRECA), p. 7.

^{35/} See e.g., AAR, p. 22; Southern Natural Gas Company (Southern), p. 5.

(ADRA), 5 USC § 581 et seq. (1992),^{36/} which specifically includes mediation as an acceptable form of alternative dispute resolution in federal administrative proceedings.^{37/}

Telocator recommends that in those instances where mediation cannot resolve an issue and the FCC has to serve as a forum of last resort, the losing party should be required to pay the full costs of the dispute resolution process, including those incurred by the "winning party" and the agency.^{38/} UTC is adamantly opposed to this suggestion, as it will inhibit those parties with legitimate disputes from attempting to get a fair resolution of their disagreements. Telocator's suggestion would coerce incumbents into settling for non-comparable alternative facilities or would pressure emerging technology service providers into paying more than reasonable relocation expenses. Moreover, Telocator's characterization of the two parties as "winners" and "losers" implies an adversarial relationship that is not necessarily accurate, and is certainly inconsistent with its own desire for good-faith negotiation.

^{36/} Southern, p. 5.

^{37/} See ADRA § 581(3).

^{38/} Telocator, pp. 13-14.